INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:	
Berger v. *United States*, 295 U.S. 78	8
Downing v. *United States*, 348 F. 2d 594	6
Ginsberg v. *United States*, 257 F. 2d 950	8
Glasser v. *United States*, 315 U.S. 60	7
Harris v. *United States*, 261 F. 2d 792, certiorari denied, 360 U.S. 933	10
Krulewitch v. *United States*, 336 U.S. 440	6
Lawn v. *United States*, 355 U.S. 339	7, 8
Orebo v. *United States*, 293 F. 2d 747, certiorari denied, 368 U.S. 958	8
United States v. *Chicago Express, Inc.*, 273 F. 2d 751	9
United States v. *Sansone*, 231 F. 2d 887, certiorari denied, 351 U.S. 987	7
Statutes:	
18 U.S.C. 471	2
18 U.S.C. 472	2
18 U.S.C. 473	2
18 U.S.C. 2314	2
Miscellaneous:	
2 Wigmore *Evidence* (3rd ed. 1940) § 300, *et seq*	9

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 394

ANTHONY D'ANTONIO, JOSEPH SPAGNOLI, LOUIS BARTEMIO AND ARTHUR RACHEL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 362 F. 2d 151.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1966 (Pet. App. B). A petition for rehearing was denied on June 30, 1966 (Pet. App. C). The petition for a writ of certiorari was filed on July 29, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners were denied a fair trial as a result of: (1) the charging of two separate conspir-

acies, (2) the remarks of government counsel, or (3) various rulings of the trial court.

STATEMENT

An indictment returned in the United States District Court for the Northern District of Illinois charged petitioners and others [1] with a conspiracy to transport counterfeit travelers' checks in interstate commerce in violation of 18 U.S.C. 2314 (Count I), a conspiracy to counterfeit and pass United States Series "E" savings bonds in violation of 18 U.S.C. 471, 472 and 473 (Count II), and the substantive offense of counterfeiting the bonds in violation of 18 U.S.C. 471 (Count III). After a jury trial, petitioners Spagnoli, Bartemio and Rachel were convicted as charged, and each was sentenced to consecutive five-year terms on the conspiracy counts, to run concurrently with a fifteen-year sentence on the substantive count (R. 197–199).[2] Petitioner D'Antonio was convicted only on count I and was sentenced to five years' imprisonment (R. 196). The court of appeals affirmed.

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[1] Sixteen unindicted conspirators were named in Counts I and II. Nine defendants were tried here; three were acquitted.

[2] On file in the office of the Clerk of this Court is the record of the district court and the court of appeals containing 276 pages. A partial transcript of the trial is also on file consisting of 32 volumes, excepting missing pages 2265 to 2772 and 6574 to 6799 between volumes. Three additional volumes containing pages 6574 to 6744, and 1 to 78 (Jury Charge) are being lodged with the Clerk of this Court. We refer to the record proper by "R." and to the transcript of the trial by "Tr.". In the case of odd volumes of the transcript separately paginated, reference is to the date of trial there transcribed.

The evidence showed that, in early 1963, Rachel, a skilled printer (Tr. 3074, 3768, G. Ex. 3441), and Bartemio, D'Antonio, and Spagnoli (Tr. 617–618, 3223) manufactured counterfeit Bank of America Travelers' Cheques in $100 and $50 denominations (Tr. 499), and that they then arranged with defendant Vito Zaccagnini and others to transport and pass the bogus checks throughout the continent (Tr. 812 *et seq.*). In September 1963, while the travelers' check operation continued, petitioners, excepting D'Antonio (Tr. 3660), conspired to manufacture, transport and pass counterfeit United States savings bonds (Tr. 782–790). As part of these schemes, prototype savings bonds and identification cards were stolen in a Chicago burglary (Tr. 252–258, 369–372) and false drivers' licenses, social security cards and voter registration cards were printed (Tr. 3462).

A substantial portion of the government's evidence consisted of the testimony of Zaccagnini and Sandra Hafford, an active participant in the fraudulent schemes (Tr. 748, 764, 791, 800, 804, 812, 849, 855, 856, 872, 884, 887, 3417, 3446, 3469).[3] Zaccagnini, testifying in great detail and at a great length (Tr. 446–1113, 1524–3364, 2796–2987), told of conferring at D'Antonio's trailer and Spagnoli's house with all petitioners regarding both schemes, of assisting in the manufacture and transportation of the counterfeit checks (Tr. 479 *et seq.*), and of "backing up"

[3] At various times Miss Hafford served as typist, telephone-answerer, message-taker, carrier, chauffeur, confidant, and receiver of a telegraphed money order. She was a trusted associate of all the conspirators.

the passers in both the check and the bond operations (*e.g.*, Tr. 862, *et seq.*). Miss Hafford related the substance of many conferences at D'Antonio's and Spagnoli's homes and of conversations with petitioners and other conspirators (Tr. 3171–3716). Much of the testimony of Zaccagnini and Hafford was corroborated by fingerprints of Bartemio, Spagnoli and Rachel found on the counterfeit obligations (Tr. 5205, 5215, 5216; G. Exs. 11, 2044B, 2044C, 580, 3473, 3255, 3341, 3473, 3474, 3475, 3476, 3477), and the testimony of other witnesses (*e.g.*, Mrs. Woods, Tr. 3081, *et seq.*), and by stipulations (*e.g.*, R. 118–121, 135, 138–139).

Other direct evidence showed the following facts: At the time of his arrest Spagnoli had in his possession an envelope marked "I.D.s" and containing a counterfeit Social Security card (G. Ex. 3480; Tr. 3829; R. 139). D'Antonio possessed a police radio and tools which his counsel (Pet. 20) described as "burglar tools" (Tr. 5884–5892). Rachel had satisfactorily completed a printer's course of training and possessed a number of volumes on printing and photography (Tr. 3768, 3079). In the Spring of 1963, Rachel and Bartemio lived in a trailer near D'Antonio's trailer home (Tr. 3114, 3116, 3529). "Clicking" sounds, like those of a small offset press, were heard from Rachel and Bartemio's trailer (Tr. 1133), and items resembling photographers' and printers' equipment were seen being moved in and out of it (Tr. 3081, *et seq.*). D'Antonio was frequently seen at the trailer (Tr. 3117), which was registered in his wife's maiden name (Tr. 129, 5800), and Bartemio made the payments on it (Tr. 1292). Rachel rented

an apartment—in which a machine resembling a printing press was seen (Tr. 5024)—under the name "A. Hoffstatter" (Tr. 1187–1210). "A. Hoffstatter" was named as the person who purchased printing supplies and type which was identical to that with which the counterfeit obligations were numbered (Tr. 1232–1245). At the time of his arrest, Bartemio's rooms contained a counterfeit Michigan driver's license in the name of "Arthur E. Hoffstatter" and four blank counterfeit driver's licenses (Tr. 1438–1439). After arrest and confrontation with the fact that his fingerprints were found on some of the forged bonds, Bartemio admitted seeing and touching some savings bonds at Spagnoli's house, but denied any knowledge of their genuineness or source (Tr. 1443).

Throughout the government's case, the trial court admitted testimony of Zaccagnini and Hafford as to the conversations and statements of the defendants with the repeated admonition that the evidence was admitted only as to the defendant who made the statement and those defendants present at the time such statement was made (*e.g.*, Tr. 460, 478). At the end of the government's case, the court admitted such statements (with specific exceptions) as to all defendants (Tr. 5262). The court instructed the jury that it could not consider the acts and declarations of one defendant against another defendant until it found that a conspiracy existed and that the other defendant was a member of the conspiracy, and that his membership must have been established by his own acts and declarations, by evidence which

related to him and not only to other defendants (Tr. Jan. 25, 1965, pp. 17, 57–59). Another instruction advised the jurors that the statement of one alleged co-conspirator to another could not be relied upon to establish the membership in the conspiracy of a defendant who was not present when the statement was made (Tr. Jan. 25, 1965, p. 35).

ARGUMENT

1. Petitioners do not question the sufficiency of the evidence to support their convictions (Pet. 6). Rather they contend that they were deprived of a fair trial because they were prosecuted in separate counts for two conspiracies (Pet. 8–19). The court below correctly rejected this contention, and there is no occasion for further review.

The existence of two different conspiracies was amply demonstrated by the differences in the persons involved, the use of different headquarters, and the fact that D'Antonio was not invited to join the second scheme, as well as the different obligations which were counterfeited and the different times involved. Moreover, the charge of two conspiracies instead of one did not prejudice petitioners at the trial. No evidence was admitted which would not have been admissible had only a single conspiracy been charged; nor was the trial unduly lengthened or complicated as a result of the form of the charges. Under well settled principles, co-conspirator Zaccagnini's testimony established prima facie the existence and membership of the conspiracies. *Downing* v. *United States,* 348 F. 2d 594 (C.A. 5). Cf. *Krulewitch* v.

United States, 336 U.S. 440; *Glasser* v. *United States,* 315 U.S. 60. Thereafter, his testimony and that of Sandra Hafford as to the statements of the various conspirators was properly admissible. Every statement as to which these witnesses testified was made in their presence or directly to them in the course of the conspiracies of which they were members and in furtherance of its objects. See *United States* v. *Sansone,* 231 F. 2d 887 (C.A. 2), certiorari denied, 351 U.S. 987.

Petitioners' contention that they were prejudiced by the use of a conspiracy prosecution is also belied by the fact that, after a 40-day trial, the jury acquitted the only three defendants, out of the nine on trial, against whom there was no evidence corroborating the testimony of Zaccagnini and Hafford (Pet. 5). It should also be noted that, although petitioners Spagnoli, Bartemio and Rachel received consecutive five-year sentences on the conspiracy counts, these terms do not exceed the concurrent fifteen-year sentence each must serve under the substantive count. See *Lawn* v. *United States,* 355 U.S. 339.

2. In complaining of the allegedly improper conduct of government counsel, petitioners take counsel's remarks out of context. Petitioners first cite (Pet. 21) the prosecutor's statement to the jury that "we determine before we put them on the stand that what they told us was the truth." In context (Tr. 6850–6854), it is clear that government counsel was answering the insinuations made repeatedly throughout the trial as to the trustworthiness of the testimony

of Zaccagnini and Hafford. After making the remark in question, counsel immediately referred to the evidence corroborating those witnesses. At no time did he attempt to give the jury the impression that he was expressing a personal opinion. Cf. *Lawn* v. *United States,* 355 U.S. 339; *Orebo* v. *United States,* 293 F. 2d 747 (C.A. 9), certiorari denied, 368 U.S. 958.

In closing argument, the prosecutor spoke of the futility of producing many witnesses from the periphery of the conspiracies (Tr. Jan. 25, 1965, pp. 17–20) and questioned the materiality of the evidence which the government could have produced as to peripheral operations. Contrary to petitioners (Pet. 21), this was not improper argument. Government counsel made no assertion that more relevant and material evidence could have been produced, as did the prosecutor in *Ginsberg* v. *United States,* 257 F. 2d 950 (C.A. 5). Nor was this a marginal case in which the jury's failure to understand the argument could have tipped the scales against the petitioners, as in *Berger* v. *United States,* 295 U.S. 78; the evidence against petitioners was overwhelming.

Finally, examination of the transcript reveals that petitioners' complaint (Pet. 25) that the prosecutor extracted scandalous testimony from a government witness is baseless. Contrary to petitioners' assertion, it was a defense attorney, not the prosecutor, who asked the allegedly offensive questions on voir dire (Tr. 1409–1419). Nor were the prosecutor's questions concerning the relationship of Rachel's sister and Bartemio improper; for the most part, they

evoked no objection at trial (see, *e.g.*, Tr. 1430–1431) and were properly termed by the court below as "incidental" (Pet. App. 6).

3. The complaints as to various other rulings at the trial are also without merit.

a. Testimony that petitioner Rachel admitted to Hafford that he had once counterfeited five dollar bills was received in evidence (as to Rachel) on the theory that the declaration tended to show he had the knowledge and ability to make the counterfeit checks and bonds involved in this case. The ruling was clearly correct. *United States* v. *Chicago Express, Inc.*, 273 F. 2d 751 (C.A. 7); 2 Wigmore, *Evidence* (3d ed. 1940) § 300, *et seq.*

b. Evidence was introduced of a burglary of the home of a witness and the theft of certain identification cards and the savings bonds (Tr. 357–372) which were shown to be those used to make the counterfeit bonds (Tr. 221–258). Petitioners called F.B.I. agent Buckingham to testify that, in searching D'Antonio's home at the time of his arrest, the arresting officers found no counterfeiting material or counterfeit documents (Pet. 26). Petitioners attempted to limit the prosecution in its cross-examination of the agent, but the court permitted questions as to what the arresting agents found in D'Antonio's house. The agent testified that the officers found a metal rod they called a punch, a few welling rods, a set of automobile keys and a two-way radio which D'Antonio stated was capable of receiving suburban police calls (Tr. 5884–5892). This cross-examina-

tion was entirely proper; the general subject of the results of the search was opened up by the defense on direct examination. Cf. *Harris* v. *United States*, 261 F. 2d 792 (C.A. 9), certiorari denied, 360 U.S. 933. Contrary to petitioners' assertion (Pet. 26), there was no reference in this testimony to "burglary equipment."

c. Petitioner Spagnoli testified that, when he picked up his seized property (in Chicago), the prosecutor told him, "We know you are innocent." The receipt for the property was dated July 16, 1964. Petitioners were in no way prejudiced by the trial court's statement, in response to defense counsel, that the prosecutor was in Freeport on July 16 (Tr. 6266–6267). Spagnoli's counsel himself conceded that the prosecutor was in Freeport on that date (Tr. 7064–7065). And the establishment of this fact in no way prevented petitioners from showing that the prosecutor was also in nearby Chicago on July 16 or that the document was not actually signed on that date. On redirect examination of Spagnoli, counsel barely touched the latter point (Tr. 6267), and he failed to ask Spagnoli's witness, Dick Williams, who was supposedly present when the alleged conversation took place, whether he had heard the remark. These opportunities were not foreclosed by the Court's remark.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

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